A

MOHD ZA'BA ABDUL TALIB & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
MOHTARUDIN BAKI JCA
[CRIMINAL APPEAL NO: B-05-216 & 218-2011]
C 20 MARCH 2013

CRIMINAL PROCEDURE: *Appeal - Trial judge's findings - Whether sufficiently evaluated evidence - Whether trial judge misdirected himself - Whether conviction safe*

D

EVIDENCE: *Adverse inference - Failure to call witness - Agent provocateur - Whether adverse inference invoked against prosecution - Evidence Act 1950, s. 114(g)*

E ***EVIDENCE:*** *Agent provocateur - Whether informer was agent provocateur - Whether informer exceeded role - Whether could claim protection under s. 40 Dangerous Drugs Act 1952*

EVIDENCE: *Witness - Credibility - Agent provocateur - Admissibility of evidence - Remark by trial judge on demeanour of witness on*
F *examination - Whether erroneous and contrary to available evidence - Criminal Procedure Code, s. 271*

The salient facts of the case was that Sjn Wong Soon Meng ('SP8'), through the informer, had spoken to one Musa over the
G hand phone where Musa had offered to sell 5kg of cannabis at RM2,500 per kg. SP8, on the instruction by ASP Munian ('SP2') acted as an agent provocateur and made arrangements to meet Musa. SP2 and his ambush team had subsequently arrested the appellants. Both appellants were charged, tried and convicted for
H trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and sentenced to death. The issues raised by the appellants in this appeal were: (i) whether the informer had exceeded his role and thus in law was actually an agent provocateur; (ii) if the answer to the first issue was positive,
I whether the failure to call the informer as a witness for the prosecution would have triggered an adverse inference under

s. 114(g) of the Evidence Act 1950 ('the Act'); and (iii) whether the learned trial judge had sufficiently dealt with the two issues above and whether he had given sufficient evaluation of the whole evidence to give effect to the position in law that the evidence of an agent provocateur was rebuttable. A

B

Held (allowing appeals; acquitting and discharging both appellants)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

C

(1) It is trite that whether a person is an informer or has become an active agent provocateur would depend on the facts of each case *(Munusamy v. PP)*. It was clear from the facts that the arrangement, provocation and suggestion for the drug transaction was conducted by the unknown informer. The informer therefore could not be termed as an informer within the meaning of s. 40 of the DDA and could not claim any protection under the said section. The informer herein was an agent provocateur. (paras 13, 14 & 15) D

(2) It is trite law now that although no agent provocateur shall be presumed to be unworthy of credit, such a presumption is still a rebuttable presumption *(Wan Azman Hassan v. PP)*. Premised on the admissibility and credibility of an agent provocateur, the very failure by the prosecution to call the informer, whom had been concluded to be an agent provocateur, would naturally trigger an adverse inference against the prosecution's case under s. 114(g) of the Act. (paras 16 & 17) E F

(3) Corollary to the need by the defence to rebut the presumed creditworthiness of an agent provocateur, it is pertinent for the defence to have access to all the witnesses that were made available at the end of the prosecution's case. Unfortunately, this was not the situation in the instant case. The prosecution had failed to produce the offered witnesses. Further, the learned trial judge's decision to proceed with the hearing of the defence despite the handicap of the defence not having access to the offered witnesses is misdirection. Such misdirection had compromised the integrity of a fair trial, particularly of one with a capital punishment. (paras 18 & 19) G H I

(4) The prosecution relied heavily on the evidence of SP8 which also involved the issue of SP8's credibility. While under re-examination, the learned trial judge, presumably acting under

A the provisions of s. 271 of the Criminal Procedure Code, made a remark as to the demeanour of SP8. The remark was to denote the sharp memory of SP8. However, the remark was erroneous and contrary to available evidence as SP8 was seen to have referred to some written notes while giving
B evidence. (paras 21 & 22)

(5) The prevailing non-appreciation of the evidence as to the role played by the informer and the consequential effect of the non-calling of the informer, who has became an agent
C provocateur, coupled with other misdirection rendered the convictions of the appellants not safe. The appellants were prejudiced and deprived of their right to a fair trial, whereby the trial proceeded without them having the benefit to interview and to call the witnesses that were made available
D to them by the prosecution but in actual fact, were untraceable. Such deprivation of the appellants' right had compromised the integrity and impartiality of the whole trial process. In light of these, the prosecution had failed to prove its case beyond reasonable doubt. (paras 23 & 24)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Fakta penting kes adalah bahawa Sjn Wong Soon Meng ('SP8'), melalui pemberi maklumat, telah bercakap dengan seorang bernama Musa melalui telefon bimbitnya di mana Musa menawar untuk
F menjual 5kg ganja pada harga RM2,500 satu kg. SP8, atas arahan ASP Munian ('SP2'), bertindak sebagai agen provokatur dan membuat persediaan untuk bertemu dengan Musa. SP2 dan pasukan serang hendapnya kemudian telah berjaya menangkap perayu-perayu. Kedua-dua perayu dituduh, dibicarakan dan
G disabitkan atas kesalahan mengedar dadah berbahaya di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB') dan dihukum mati. Isu-isu yang dibangkitkan oleh perayu-perayu dalam rayuan ini adalah: (i) sama ada pemberi maklumat telah melampaui peranannya dan dengan itu adalah sebenarnya seorang agen
H provokatur dari segi undang-undang; (ii) jika jawapan kepada isu pertama adalah positif, sama ada kegagalan memanggil pemberi maklumat sebagai saksi pihak pendakwaan membangkitkan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 ('Akta'); dan (iii) sama ada yang arif hakim perbicaraan telah
I mempertimbangkan kedua-dua isu di atas dengan sewajarnya dan sama ada beliau telah meneliti dengan secukupnya kesemua keterangan untuk memberikan kesan dari segi undang-undang bahawa keterangan agen provokatur boleh dipatahkan.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu-perayu)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Adalah matan bahawa sama ada seseorang itu adalah pemberi maklumat atau menjadi agen provokatur yang aktif bergantung kepada fakta setiap kes *(Munusamy v. PP)*. Jelas daripada fakta bahawa pengaturan, provokasi dan cadangan bagi transaksi dadah tersebut dilakukan oleh pemberi maklumat yang tidak diketahui. Oleh itu, pemberi maklumat tersebut tidak boleh dikatakan sebagai pemberi maklumat dalam rangkuman s. 40 ADB dan tidak boleh menikmati apa-apa perlindungan di bawah seksyen tersebut. Pemberi maklumat di sini merupakan agen provokatur.

(2) Adalah undang-undang matan kini bahawa walaupun agen provokatur tidak boleh dianggap sebagai tidak boleh dipercayai, anggapan sedemikian masih boleh dipatahkan *(Wan Mohd Azman Hassan v. PP)*. Berdasarkan kepada kebolehterimaan dan kebolehpercayaan agen provokatur, kegagalan oleh pihak pendakwaan untuk memanggil pemberi maklumat, yang telah diputuskan sebagai agen provokatur, akan secara semulajadi mencetuskan anggapan bertentangan terhadap kes pihak pendakwaan di bawah s. 114(g) Akta.

(3) Berikutan keperluan oleh pihak pembelaan untuk mematahkan anggapan kebolehpercayaan agen provokatur, adalah penting bagi pihak pembelaan mempunyai akses kepada kesemua saksi yang tersedia di akhir kes pihak pendakwaan. Malangnya, ini bukan apa yang berlaku dalam kes ini. Pihak pendakwaan telah gagal mengemukakan saksi-saksi yang ditawarkan. Malahan, keputusan yang arif hakim perbicaraan untuk meneruskan dengan perbicaraan pihak pembelaan walaupun dengan ketiadaan akses oleh pihak pembelaan kepada saksi-saksi yang ditawarkan merupakan satu salah arahan. Salah arahan tersebut telah mengkompromikan integriti keadilan perbicaraan, khususnya yang melibatkan hukuman berat.

(4) Pihak pendakwaan, dalam kesnya, banyak bergantung kepada keterangan SP8 yang juga melibatkan isu kebolehpercayaan SP8. Semasa diperiksa balas, yang arif hakim perbicaraan, barangkali bertindak di bawah peruntukan s. 271 Kanun Tatacara Jenayah, mengulas mengenai tingkah laku SP8.

A Ulasan tersebut mengarah kepada ingatan tajam SP8. Walau bagaimanapun, ulasan tersebut adalah khilaf dan bertentangan dengan keterangan yang ada kerana SP8 dilihat telah merujuk kepada nota bertulis semasa memberikan keterangan.

B **(5)** Kegagalan mempertimbangkan keterangan yang sedia ada mengenai peranan yang dimainkan oleh pemberi maklumat dan kesan daripada kegagalan memanggil pemberi maklumat, yang merupakan agen provokatur, disatukan dengan salah arahan lain menjadikan sabitan perayu-perayu tidak selamat. Perayu-
C perayu diprejudiskan dan dinafikan hak mereka untuk perbicaraan adil, di mana perbicaraan diteruskan tanpa memberikan peluang kepada mereka untuk menemuduga dan memanggil saksi-saksi yang sedia ada daripada pihak pendakwaan tetapi sebenarnya tidak boleh dikesan. Penafian
D hak perayu-perayu yang sedemikian telah mengkompromikan integriti dan keadilan keseluruhan proses perbicaraan. Berdasarkan perkara ini, pihak pendakwaan telah gagal membuktikan kesnya melampaui keraguan munasabah.

Case(s) referred to:
E *Hari Bhadur Ghale v. PP [2012] 7 CLJ 789 FC* ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(foll)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(dist)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ
F *(Rep) 241 SC* ***(foll)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(foll)***

Legislation referred to:
G Dangerous Drugs Act 1952, ss. 39B, 40, 40A
Evidence Act 1950, s. 114(g)

For the 1st appellant - Roseli Abdul Ghani; M/s AG Roseli & Assocs
For the 2nd appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Siti Rafidah Zainuddin; DPP
H

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-2-2010]

Reported by S Barathi

I

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] Both appellants were charged, tried and convicted of an offence of trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952. They were sentenced to death. The charge against the appellants at the High Court reads as follows:

> Bahawa kamu pada 10 Jun 2009, jam lebih kurang 8.30 malam, di Jalan 16, Taman Dato'Harun, Petaling Jaya dalam daerah Petaling di dalam negeri Selangor Darul Ehsan, didapati kamu bersama-sama mengedar dadah berbahaya jenis Cannabis 4894gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibacakan bersama seksyen 34 Kanun Keseksaan.

Facts Of The Case

[2] The whole of the prosecution's case centred on the evidence of one Sjn Wong Soon Meng, SP8. His evidence can be summarised as follows:

> SP8 was an agent provocateur, having been instructed by SP2 (ASP Munian a/l Muniandy) to act as such after SP8 had informed him that his informer had information that a male Malay by the name of Musa had drugs to sell. SP8 had assumed the name of Ah Keong. It was his evidence that through the informer he had spoken to Musa over the hand phone where Musa had offered to sell 5 kilos of cannabis at RM2500.00 per kilogram. After SP8 had agreed to the price Musa told SP8 to meet at 8.00 pm that night (that is on 10-6-2009) at Taman Permainan Kanan-Kanak at Jalan 16, Taman Dato'Harun, Petaling Jaya (the playground). SP8 told Musa that he would be coming in a Toyota Vios, bearing registration no. WQV 4610 (Toyota). SP8 then reported to SP2 about the meeting and SP2 then planned a trap.

[3] At about 7.30pm SP2 and his men had taken up ambush positions at the playground. At about 7.45pm SP8 drove to the playground and parked the Toyota at a spot beside the playground and waited outside the Toyota. About five minutes later a male Malay walked toward him and introduced himself as Musa (whom SP8 identified as the 2nd appellant). It was SP8's version that the 2nd appellant asked for the RM12,500. SP8

showed it to him which was in his sling bag. The 2nd appellant, after having sight of the money, told SP8 that the cannabis would be delivered within 30 minutes and walked away toward the direction he came from.

[4] At about 8.30pm SP8 saw a motorcycle which was ridden by a male Malay. The said male Malay (subsequently identified as the 1st appellant) approached SP8. He then handed to SP8 a black sling bag and at the same time said "5kilo ganja ada di dalam". SP8 checked its contents and upon seeing there were compressed slabs suspected to be cannabis, SP8 then gave the pre-arranged signal to SP2 and his men to arrest the 1st appellant.

[5] Meanwhile, the 2nd appellant was also arrested by the police ambush party.

Issues Canvassed At The Appeal

[6] Both learned counsel for the appellants concentrated their arguments on the central issue of SP8 being the agent provocateur and the role played by the informer in the whole episode. Arising from such line of arguments, the relevant issues to be determined in this appeal are:

(a) Whether, from the facts of the case, the informer has exceeded his role and thus in law is actually an agent provocateur?;

(b) If the answer to the first issue is positive, then the next issue is whether the failure to call the informer as a witness for the prosecution would have triggered the adverse inference under s. 114(g) of the Evidence Act?; and

(c) Whether the learned trial judge has sufficiently dealt with the two issues above and whether he has given sufficient evaluation of the whole evidence to give effect to the position in law that the evidence of an agent provocateur is rebuttable.

Our Analysis Of The Available Evidence

[7] Before we deal with the above mentioned issues, it is pertinent to state the following undisputed facts relating to the evidence of Sjn Wong Soon Meng, SP8:

(a) SP8 never met the supplier of the drugs prior to the police ambush and consequential arrests of the appellants on the evening of 10 June 2009.

(b) All information, that formed the basis for the briefing by ASP Munian (SP2) at 5pm on 10 June 2009 and which led to formation of the police ambush party came from the informer, as narrated by SP8.

(c) It was only at the said briefing (at 5pm, on 10 June 2009) that SP8 was designated to be the drug purchaser. SP8 was just the final actor for the final scene.

[8] The above salient and undisputed facts can be gleaned from the following evidence of SP2 (ASP Munian), as can be found from pp. 28-30 of the appeal records, which reads as follows:

> Pada 10.6.2009 jam lebih kurang 2.00 petang Sjn. Wong Soon Meng memaklumkan kepada saya bahawa sumbernya ingin berjumpa dengan beliau di kawasan Petaling Jaya kerana sumbernya ada maklumat untuk disampaikan kepada Sjn. Wong dan saya membenarkan Sjn. Wong untuk berjumpa dengan sumber tersebut.
>
> Jam lebih kurang 3.30petang Sjn. Wong telah memaklumkan kepada saya bahawa beliau ada bersama sumbernya di sebuah Restoran Syed di kawasan Petaling Jaya di mana sumber telah memberitahu Sjn. Wong bahawa ada seorang lelaki Melayu dengan panggilan 'Musa' yang dikenali oleh sumber memberitahu bahawa lelaki bernama Musa ini ingin menjual 5kilogram ganja dan beliau meminta sumber Sjn. Wong mencari seorang pembeli. Menurut Sjn. Wong, sumber telah memberitahu harga yang ditawarkan oleh Musa ialah RM2,500 bagi satu kilo ganja.
>
> Saya telah memberitahu kepada Sjn. Wong supaya beliau bertindak sebagai pembeli dan penyamar sulit dan beliau bersetuju. Lebih kurang jam 3.45 petang Sjn. Wong telah memaklumkan kepada saya bahawa Musa telah bersetuju untuk membekalkan 5 kilogram ganja kepada Sjn. Wong dan lokasinya ialah di sebuah Taman Kanak-kanak, Jalan 16 Taman Dato' Harun. Perjumpaan dan urusan akan dibuat jam lebih kurang 8.00malam pada hari yang sama.
>
> Saya telah mengarahkan Sjn. Wong untuk menghadiri taklimat jam 5.00 petang di Tingkat 4, IPK Selangor. Saya juga telah arahkan anggota-anggota lain dan dua orang pegawai untuk menghadiri taklimat tersebut.
>
> Dalam taklimat tersebut saya telah memberitahu pegawai dan anggota bahawa pada jam 8.00 malam Sjn. Wong Soon Meng akan bertindak sebagai pembeli ganja sebanyak 5kilogram daripada seorang lelaki Melayu yang tidak di kenali di Jalan 16 dekat satu taman kanak-kanak. Maklumat ini hasil daripada sumber Sjn. Wong.

[9] Corroborative evidence of the said salient facts, on the role of the informer, can be seen in the evidence of one of the members of the ambush party, L/kpl. Samsuri (SP7) who testified as follows:

> Pada 10.6.2009 jam 5.00 petang saya berada di pejabat Narkotik IPK Selangor mendengar taklimat yang disampaikan oleh Ch.Insp. Munian a/l Muniandy (SP2).
>
> Semasa taklimat, anggota yang turut bersama ialah Ch. Insp. Shukri, Insp. Wong, Sjn. Major Jamaludin, Sjn. Samsul, Sjn. Mazelan, Sjn. Yusof, Kpl. Amiruddin, L/Kpl. Hasdi, L/Kpl. (W) Norsilawati dan L/Kpl. Rahman.
>
> Taklimat oleh Ch.Insp. Munian mengenai satu operasi akan dijalankan di kawasan Jalan 16, Taman Dato' Harun. Maklumat daripada Sjn. Wong satu transaksi akan dilakukan di kawasan tersebut di mana Sjn. Wong sebagai AP (buyer) dan di mana seorang lelaki Melayu sebagai pembekal dikenali dengan nama Musa di mana bekalan dihantar sebanyak 5 kilo dengan harga RM2,500 sekilo.

[10] It is to be noted that SP8 himself acknowledged that before he talked to the 1st appellant *via* handphone, the informer had already informed him of the amount of drug and the agreed price. This can be seen in the cross-examination and re-examination of SP8 (at pp. 120 and 121 of the appeal records) which reads as follows:

> **Pemeriksaanbalas** – oleh Peguam OKT 2
>
> Saya bercakap dengan orang yang dikenali "Musa" sekali sahaja. Saya guna handphone sumber. Saya tahu nombor telefon "Musa".
>
> (Pada masa ini peguambela bertanya saksi apa yang saksi bacakan semasa memberi keterangan.
>
> Saksi kata dia ada nota catatan dan dia tunjukkan kepada Mahkamah. Dia kata telah merujuk kepada nota ini dari awal keterangannya. Peguambela pohon untuk melihat nota itu.
>
> TPR tiada halangan nota yang ditulis oleh saksi ditunjuk kepada peguambela-peguambela OKT 1 dan OKT 2).
>
> Saya sediakan nota catatan ini dua hari sebelum perbicaraan. Saya ada ID saya. Ini tulisan saya sendiri.

Peguambela OKT 2 pohon ia ditanda sebagai Ekshibit Pembelaan. A

Nota yang dicatit SP8 - ditanda exh. D35

Pemeriksaan Semula (sambungan)

Nombor telefon "Musa" ialah 017 6668062 (dengan ingatan saksi ini sendiri). B

Sumber yang beritahu saya nombor telefon "Musa" itu.

Saya bercakap dengan "Musa" lebih kurang 10 minit. Saya dengar suara dia sahaja. Masa itu saya di restoran Nasi Kandar di Petaling Jaya. C

Sebelum cakap dengan "Musa", sumber telah beritahu 5kilogram dengan harga berjumlah RM12,500.

[11] The law pertaining to the issue of the role of an informer and that an agent provocateur are as provided for under ss. 40 and 40A of the Dangerous Drugs Act 1952. The relevant section reads as follows: D

Protection of informers E

40. (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery. F

(2) If any book, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further. G

(3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer. H I

Evidence of agent provocateur admissible

40A. (1) Not with standing any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Not with standing any rule of law or this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[12] From the facts adduced at the trial, namely the evidence of SP2, SP7 and SP8 himself, it is clear that the arrangement, provocation and suggestion for the drug transaction was conducted by the unknown informer. There is a judicial pronouncement by the Federal Court as to what is an agent provocateur. It is "one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested." In the *Dictionary of Law* by LB Curzon,he is defined as a person:

> ... who enticed another commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.

(See: *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529; [2010] 4 MLJ 141). This was also adopted in *Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789; [2012] 6 MLJ 597.

[13] The next main issue to be dealt with is whether the informer was an agent provocateur. It is trite law, as held in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 that whether a person is an informer or has become an active agent provocateur would depend on the facts of each case. In that case all the informer did was merely to accompany and introduce a police officer to the accused person.

[14] From the facts and circumstances of the case for the prosecution, it is our judgment that the informer cannot be termed as an informer within the meaning of s. 40 of the Dangerous Drugs Act 1952 and cannot claim any protection under the said section. The informer's role in this case is akin to that of Francis in *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336. The informer in this appeal is an agent provocateur.

[15] It is now trite law that although no agent provocateur shall be presumed to be unworthy of credit, such a presumption is still a rebuttable presumption. This position was held in *Wan Mohd Azman Hassan (supra)* which held that:

> As for the creditworthiness of an agent provocateur as a witness Spencer Wilkinson J in Teja Singh made the following remarks:
>
> > It appears from the extract above quoted that the learned author of Roscoe's Criminal Evidence classed agents provocateur in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him.
>
> This observation of the creditworthiness of an agent provocateur is now enshrined in s. 40A(1) of the Act which now provided that presumption on creditworthiness.
>
> This presumption of being a creditworthy witness is of course rebuttable. It falls upon the defence then to adduce sufficient evidence for the court to conclude that the evidence of an agent provocateur is unworthy of credit (see *Public Prosecutor v. Han Kong Juan & Ors* [1983] CLJ Rep 773).
>
> Under s. 40A of the Act, the evidence of the agent provocateur cannot be excluded in the exercise of judicial discretion (see *Evidence Practice and Procedure* (3rd edn) by Augustine Paul). An otherwise admissible evidence such as this one under s 40A of the Act does not become inadmissible merely because it had been improperly or unfairly obtained. Section 40A(2) of the Act affirms this admission notwithstanding any other laws, written or otherwise, to the contrary. He may thus relate the full story of what happened in his negotiations with the drugs seller and any statements made by the latter to him shall be admissible in evidence.

[16] It is also our judgment that premise on the above admissibility and credibility of an agent provocateur, the very failure by the prosecution to call the informer (of which we had concluded to be an agent provocateur) would naturally trigger an adverse inference against the prosecution's case, under s. 114(g) of the Evidence Act.

[17] It is also our judgment that corollary to the need by the defence to rebut the presumed creditworthiness of an agent provocateur it is pertinent for the defence to have access to all the witnesses that were made available at the end of the prosecution's case. Unfortunately this was not the situation in this case.

[18] It is clear from the notes of proceedings at the trial that the prosecution failed to produce the offered witnesses. It is also noted that the learned trial judge in deciding to proceed with the hearing of the defence despite the handicap of the defence not having access to the offered witnesses, is a misdirection. Such misdirection had compromised the integrity of a fair trial, particularly of one with a capital punishment.

[19] That particular misdirection can be seen in the notes of proceedings and the ruling made by learned trial judge (at pp. 154-155 of the appeal records).

Which reads as follows:

> Pihak Pendakwaan diingatkan kali yang kedua ini supaya mengesan dan mengadakan saksi-saksi no. 15 hingga 19 dalam senarai saksi untuk ditemu duga oleh pihak pembela – saksi-saksi itu yang telah diterima oleh pihak pembela.
>
> Pegawai penyiasat hadir hari ini untuk memaklumkan yang dia masih tidak dapat mengesan saksi-saksi itu kecuali saksi no. 16 iaitu Amir Hamzah yang dia katakan hadir hari ini tetapi tidak kelihatan lagi di Mahkamah. Untuk lain-lain saksi I.O hanya telah memohon bantuan IPD Brickfields untuk mengesan semua saksi-saksi itu dan I.O telah menghantar wakil ke Maxis untuk mendapat butir-butir mengenai saksi-saksi itu, dan I.O sendiri tidak berusaha mengesan saksi-saksi itu.
>
> Biarpun begitu kes ini akan terus dijalankan tanpa manfaat di pihak pembelaan untuk menemu duga saksi-saksi itu dan seterusnya membentangkan pembelaan OKT1 dan OKT2.

[20] We also note that the prosecution's case relied heavily on the evidence of SP8. It therefore also involved the issue of the credibility of SP8. To recapitulate, we did earlier referred to certain parts of the evidence of SP8, where the witness was caught referring to some written notes while giving evidence. This particular note was then produced by the defence as exh. D35. While under re-examination (at p. 121 of the appeal records) the learned trial judge, presumably acting under the provisions of s. 271 of the Criminal Procedure Code, made a remark as to the demeanour of the witness, SP8. This particular evidence and remark reads as follows:

> Nombor telefon "Musa" ialah 017 6668062 (dengan ingatan saksi ini sendiri).

[21] It is our judgment that the particular remark is to denote the sharp memory of SP8. But if one were to see the evidence (at p. 121 of the appeal records) as a whole and giving maximum evaluation to the evidence recorded therein, one will realise that the telephone number given was the one as noted in exh. D35. That particular number was in fact a revised number after a deletion. This can be seen in exh. D35 (can be at p. 344 of the appeal records). As such, to our mind, such remark is erroneous and contrary to available evidence.

Conclusion

[22] Adopting the approach in dealing with criminal appeals, in *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, we conclude that with the prevailing non appreciation of the evidence as to the role played by the informer and the consequential effect of the non calling of the said informer (who has became an agent provocateur) and coupled with other misdirection's as expounded above, the convictions of the appellants are not safe.

[23] We are particularly concerned with the situation where the appellants were prejudiced and deprived of their right to a fair trial, whereby the trial proceeded without them having the benefit to interview and to call the witnesses that were made available to them by the prosecution but in actual fact were untraceable. Such deprivation of the appellants' right had compromised the integrity and impartiality of the whole trial process. On this issue,

perhaps it is appropriate to quote what was said by the Supreme Court in the case of *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] CLJ (Rep) 265 at p. 271; [1992] 1 MLJ 137 at p. 142, which reads as follows:

> If some of these claimed witnesses cannot be traced, it was a combination of unhappy circumstances in this case. The accused cannot be penalized for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

[24] In the light of the above, we conclude that the prosecution has failed to prove its case beyond reasonable doubt. And as the convictions are not safe, we allow the appeals by both appellants. Accordingly their convictions and sentences were set aside and both of them were accorded with the order of acquittal and discharge.